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# VIDEOTAPE TRIALS: RELIEF FOR OUR CONGESTED COURTS\*

BY JAMES L. McCRYSTAL\*\*

## INTRODUCTION

A salient hallmark of the modern historical era has been rampant technological growth, a phenomenon which has radically altered the very structure of human existence. Today, technological sophistication touches almost every aspect of our lives. One area of paramount importance to society, however, has remained relatively unaffected by the dramatic changes in material culture: the trial process. If John Marshall or Abraham Lincoln were to visit a modern courtroom, they would experience a comfortable familiarity with the proceedings. If, on the other hand, the doctors who attended these famous jurists at their deathbeds were to visit a modern hospital operating room, they would doubtlessly express a high degree of incredulity and perplexity with respect to the modern techniques employed therein. This hypothetical comparison of the medical and legal professions is presented only to illustrate the fact that, in large part, the litigative process has remained an island sanctuary in the midst of the modern technological revolution.

This is not to say that our judicial system has enjoyed no benefits from technological developments. Indirectly, technology has enhanced the search for truth through its effect upon evidentiary concerns via modern scientific inventions (such as radar and x-ray machines) and techniques (blood-grouping and ballistics testing, for example). The tasks of court administrators and managers have been significantly eased through the

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\*\* Judge, Court of Common Pleas, Erie County, Sandusky, Ohio; Ph. B., John Carroll University, 1940, J.D., University of Michigan, 1943. [The author was the presiding judge at the *McCall* trial described in the article and one of the draftsmen of Superintendence Rule 15 set forth in the Appendix — Ed.]

use of computer programming for scheduling and data collection purposes.<sup>1</sup> Though such instances are numerous, the fact remains that once the bailiff raps his gavel and announces, "Hear ye, hear ye, this court is now in session," the trial process which ensues is presently conducted in substantially the same manner as it has been for the past several centuries.

To a great extent because of this hoary process, court docket congestion is a serious problem of our times. The steadily increasing magnitude of court congestion is threatening to inundate the legal process.<sup>2</sup> In the last few decades, several devices have been employed to relieve court congestion. Modern liberalized rules of discovery and pleading have helped to shorten trials and promote settlements out of court. Another method to ameliorate the burden on the courts has been the alteration of fundamental legal rights, removing decisionmaking responsibilities from the court and jury (workmen's compensation and no-fault automobile insurance are examples). Comparatively little attention and effort, however, have been directed to streamlining the trial process itself in a manner which permits retention of the jury system through the expedition of the jury trial procedure itself. This article will address the latter alternative and discuss the potential advantages to be derived from the integration of one modern technological invention—that of videotape—into the trial process.

Videotaping has already been introduced into the legal system for limited uses (depositions, demonstrative evidence, and records for appeal),<sup>3</sup> but, in the author's opinion, its advantages have not as yet been fully exploited. The purpose of this article is to draw attention to the potential benefits to be gained from the use of videotaping in lieu of testimony at trial in a way which will expedite and fundamentally improve conventional trial court methods. Discussion will focus on actual experimentation with a videotape trial conducted in Ohio, and the changes in the Ohio Rules of Civil Procedure precipitated by this experiment.

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<sup>1</sup> Adams, *The Move Towards Modern Data Management in the Courts*, 23 FLA. L. REV. 250 (1971).

<sup>2</sup> H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* (1959); Desmond, *Juries in Civil Cases—Yes or No?*, 36 N.Y.S.B.J. 104 (1964); Comment, *Abolition of the Civil Jury: Proposed Alternatives*, 15 DE PAUL L. REV. 416, 417 (1966); Comment, *The Streamlined Jury System*, 36 S. CAL. L. REV. 89, 90-92 (1962).

<sup>3</sup> See pp. 465-66 *infra*.

## I. SUBSTITUTIONAL USES OF VIDEOTAPE

The videotape process is a recent technological advancement, first put to use on a practical scale by the television industry in the mid-1950's.<sup>4</sup> Although its employment soon became commonplace in television, the videotape technique was introduced into the legal arena only in the last few years. In this brief span of time, however, utilization of the videotape in the legal process has found several outlets.<sup>5</sup> In alcohol-related driving offenses, for example, videotapes of defendants are made at the time of arrest and later presented to the jury at trial as a type of demonstrative evidence, enabling the jurors to witness the behavior and demeanor of the defendant as he was at the time of his apprehension.<sup>6</sup> In criminal trials, videotapes of defendants have been successfully introduced into evidence.<sup>7</sup> Significantly, and no doubt a presage of changes on a broader scale, the Federal Rules of Civil Procedure were modified 3 years ago to permit the recording of depositions by other than stenographic means.<sup>8</sup> This rule faced an early challenge in a case involving the use of a videotape deposition and was upheld as the court approved this modern method of recording depositions.<sup>9</sup> Several states now allow videotape depositions to be used at trial in lieu of the traditional written type.<sup>10</sup> The videotape recording method has appealed to some judicial administrators as a potentially effective means by

<sup>4</sup> Comment, *Videotape: A New Horizon in Evidence*, 4 JOHN MARSH. J. PRAC. & PROC. 339 n.1 (1971).

<sup>5</sup> For a well-documented treatment of the various uses of videotape in the legal system, present and potential, see Comment, *Judicial Administration — Technological Advances — Uses of Video-tape in the Court Room and Station House*, 20 DE PAUL L. REV. 924 (1971).

<sup>6</sup> Kane, *Videotape Recording*, 50 JUDICATURE 272 (1967).

<sup>7</sup> *State v. Lusk*, 452 S.W.2d 219 (Mo. 1970); *Paramore v. State*, 229 So. 2d 855 (Fla. 1969), noted in Stewart, *Videotape: Use in Demonstrative Evidence*, 21 DEF. L.J. 253, 256 (1972).

<sup>8</sup> FED. R. CIV. P. 30(b)(4). Effective on July 1, 1970, the rule provides: The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made a party may nevertheless arrange to have a stenographic transcription made at his own expense.

<sup>9</sup> *Carson v. Burlington N., Inc.*, 52 F.R.D. 492 (D. Neb. 1971), noted in Stewart, *supra* note 7, at 259.

<sup>10</sup> See, e.g., OHIO R. CIV. P. 40(B) in Appendix; Blews & Patterson, *On Trial: Videotape*, 46 FLA. B.J. 159 (1972); Wong, *More States Allow the Use of Videotapes in Court as Substitutes for Live Appearances by Witnesses*, Wall Street Journal, Sept. 5, 1972, at 28. Also, as the Carson case, *supra* note 9, implies, a rule which allows recording of a deposition by "other than stenographic means" may be construed to permit recording

which to prepare the official trial record. Experiments conducted in the state of Illinois testing the efficacy of this notion have led to positive results.<sup>11</sup> The preceding examples illustrate the fact that a growing segment of the legal community is receptive toward the adoption of modern technological devices into the legal system as a means to bring about improvements in conventional trial practice. In sum, the advantages of videotaping in the context of the courtroom setting have been recognized by several jurisdictions, and although the practice is by no means catholic as yet, these technological inroads appear to be of no light moment. Rather it seems that the practice signals a far more widespread usage in the future.

The uses of videotape described above, however, are limited in character and do not work any profound change upon the nature of the conventional trial system. They are mere substitutes for, and additions to, traditional modes of presentation of evidence and the preparation of trial records. At present they promise no real departure from the methods of the past. Although these uses allow a fact finder a broader base upon which to evaluate proffered evidence, they only comprise a substitute for and refinement of conventional evidentiary methods. These limited applications of videotape have not wrought and do not promise to effect any fundamental change in the age-old conduct of trials.

## II. ENTIRE TRIAL BY VIDEOTAPE

In 1971, this author suggested that, as compared to the present restricted uses of videotaping in the courtroom, the videotape recording method could yield far greater benefits for the trial process if utilized for the examination of *all* witnesses in a civil suit.<sup>12</sup> Rather than using videotape on a piecemeal basis as a substitute for parts of the testimonial process, it could supplant that process entirely. In other words, the whole trial (with the exception of voir dire, opening statements, and closing arguments) could be conducted by videotape as a means to expedite trials in a manner which would ultimately lead to enhanced efficiency in the litigative process and

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by videotape. Since some states have similar rules, the use of videotape depositions promises to increase in the future. See, e.g., ALA. R. Civ. P. 75.

<sup>11</sup> Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A.J. 457 (1969); Sullivan, *Court Record by Video-Tape Experiment—A Success*, 50 CHI. B. REC. 336 (1969), in 41 N.Y.S.B.J. 695 (1969).

<sup>12</sup> McCrystal, *Videotape Trials*, 44 OHIO B. 639 (1971).

thus serve to decrease docket backlogs and relieve the present overwhelming burden on the court system. To investigate the efficacy of this idea, it was proposed by this writer that a pilot videotape trial be conducted in order to afford the bench and bar an opportunity to evaluate the suggestion. The proposal was soon given the means of its accomplishment through a generous grant from the Ohio Judicial Conference. All, then, that was lacking was a legal controversy, ripe for litigation, in which all participants would consent to the trial of the case in this experimental (albeit for these parties, final) mode. An ideal dispute was found, and in November of 1971, the concept of videotape trials had its first day in court.

A. *McCall v. Clemens: The First Videotape Trial*

*McCall v. Clemens*,<sup>13</sup> became the first case in legal annals to be tried almost in its entirety through the medium of videotape. The plaintiff, McCall, was walking upon a city sidewalk when he was struck by an automobile driven by the defendant, Mrs. Clemens, who had lost control of her car. Liability, having been admitted, was not at issue. McCall alleged in his complaint that he had suffered serious injury to his left shoulder, arm, and hand. The trial was restricted to the resolution of a single issue: the nature and extent of the plaintiff's alleged injuries and the amount of compensatory damages. Being an uncomplicated and relatively simple action, *McCall* was ideally suited to the needs of an experimental test of the utility of the videotape trial proposal.<sup>14</sup> As a personal injury suit involving a moderate claim, it was the type of case which typically consumes a substantial portion of docket time in many civil courts. Success with this kind of action, therefore, could well presage a significant impact upon docketing in the future. In addition, it is with this type of case that trial lawyers most often express grave doubts with respect to the quality of a trial conducted by prerecorded testimony. Thus, the *McCall* case provided a testing ground for the misgivings which typically arise in the trial attorney's mind when confronted with the idea of videotape trials.

Four witnesses testified in *McCall*: the plaintiff, a policeman, a doctor, and a hospital records librarian. All of the testimony was gathered and recorded 1 to 2 weeks in advance of

<sup>13</sup> No. 39,301 (C.P. Erie County, Ohio, Nov. 18, 1971). This case first received national attention following the publication of Gunther, *Is Videotape the Answer for our Crowded Courts?*, TV GUIDE, MAR. 25, 1972, at 6.

<sup>14</sup> Murray, *Comments on a Videotape Trial — From Counsel for the Plaintiff*, 45 OHIO B. 25-27 (1972).

the actual trial. Each witness was examined in the presence of the parties, the attorneys, and the videotape technician.<sup>15</sup> The format of the examinations closely resembled that of the present-day deposition, however, the crucial difference was that the testimonial process was conducted as if it were taking place before the court. Questions were necessarily restricted to those tending to elicit evidence legally admissible in a court of law. In other words, the narrower trial concept of relevance operated to restrict the form of questions and the content of answers to admissible testimony, as opposed to the broader concept of relevance to the subject matter as now applies to the taking of depositions. Objections to the questions and answers were made immediately as they arose according to conventional trial practice (the videotape operator noting the precise moment of the objection for future reference). However, in the absence of the trial judge, no rulings were made concerning the objections at the time of the recording session.

The day after all of the testimonial evidence was completed and recorded, the judge met with the two attorneys to view portions of the unedited master tape in order to rule upon the objections. Using a digital counter device on the recorder, the videotape operator located on the master tape the questions and answers to which objections had been raised. The court viewed this selected footage and heard arguments of the attorneys with respect to the objections and rendered its rulings. If the objection was overruled, the question and answer remained on the tape, but the objection was deleted. If the objection was sustained by the court, the question, the answer, and the objection were all ordered deleted from the finished tape which the jury later viewed. In the presence of the court, the trial tape was prepared from the unedited master tape. The trial tape was, of course, shorter than the original master tape because only those questions and answers which the court deemed admissible were retained. The unedited and complete master tape, containing all questions, answers, and comments of counsel, was filed with the court and preserved for the purpose of appeal should either party later challenge the proceedings. Following preparation of the trial tape, the court rendered its instructions to the jury which were recorded and made part of the trial tape.

<sup>15</sup> The doctor's testimony was originally taken on videotape as a deposition. When I learned of the excellent results, I then asked counsel for both parties if they and their clients would agree to complete the entire trial by videotape. All concerned consented, thus allowing the first videotape trial to be conducted.

The actual trial commenced at 9 o'clock on the morning of November 18, 1971. The jury was impaneled in the usual manner with the attorneys conducting the voir dire in the presence of the court. Given the novel character of the proceedings the attitudes of the prospective jurors concerning their perceived ability to render a fair and impartial verdict on the basis of recorded testimony was investigated thoroughly. After the jury was seated, both attorneys personally delivered their opening statements. At the close of those statements, the videotape monitors were turned on, and the jury viewed the testimony that had been recorded well in advance of the trial.<sup>16</sup> Normal recesses were taken, and when the testimony was concluded, the two attorneys delivered their closing arguments in person. Thereafter, the court's instructions were shown on videotape, and then the jury retired to consider its verdict.

The full courtroom presentation and jury deliberation took only 1 day, commencing at 9 o'clock in the morning and ending with a verdict at 5 o'clock in the afternoon.<sup>17</sup> If conducted in the usual manner, this action could easily have consumed 2 days' time. The recorded testimony ran approximately 2 hours and 40 minutes, and the jury was able to view it without interruption. The court never viewed the entire testimony and needed only 15 minutes to rule on counsels' objections. Except for voir dire, opening statements, and closing arguments (which were recorded for inclusion in the trial record), the complete presentation of the dispute to the jury was accomplished through technological means.

The reactions of the principal actors and participants in this unique experiment were, on the whole, positive and favorable, and this pilot trial generated much discussion in the legal community.<sup>18</sup> The advantages of trial by videotape are many and varied. Following a brief consideration of them, we will turn to a discussion of what *McCall* portended for the trial process in the state of Ohio, in particular, and what it may portend for the United States in general.

#### B. *The Advantages of Videotape Trials*

The *McCall* experiment and other ventures involving the use of videotape in the trial context have demonstrably shown

<sup>16</sup> At the time of the trial when the jury viewed the videotape, one witness, the doctor, was in Hawaii.

<sup>17</sup> The jury returned a verdict for \$9600. No appeal was taken.

<sup>18</sup> McCrystal, *Ohio's First Videotape Trial: The Judge's Critique*, 45 OHIO B. 1 (1972); Murray, *supra* note 14; Watts, *Comments on a Video Tape Trial—From Counsel for the Defense*, 45 OHIO B. 51 (1972); Symposium, *First Videotape Trial: Experiment in Ohio*, 21 DEF. L.J. 267 (1972).



that many benefits are to be gained from the proper utilization of this innovative technique within the judicial system. Advantages accrue to each actor in the trial process, and cumulatively, these benefits may be said to work a fundamental improvement upon conventional trial practice. Although some problems remain to be solved in the future, even at this early experimental stage, the videotape process has already proven its worth and inestimable value to those who have witnessed its working firsthand.

At this point in time, the concept of the videotape trial is still at an early stage of development. As of the date of this writing, only the *McCall* experiment and four other trials in Ohio have been conducted completely via the medium of videotape.<sup>19</sup> In view of the nascence of the idea, no empirical data exists from which to generalize findings concerning the merits of videotape trials vis-a-vis the conventional trial scheme. Therefore, the purported advantages outlined in this section are not as yet amenable to documentary support, but rather derive primarily from the author's 21 years of experience as a trial judge and his involvement in the *McCall* experiment.<sup>20</sup> Given this state of affairs, the discussion is necessarily rather intuitive in content, informal in tone, and certainly more suggestive than conclusive, and does not purport to represent a truly definitive statement on the merits of the idea. Rather, it is admittedly hoped that this somewhat cursory listing of advantages to be derived from the videotape trial technique will stimulate interest in the idea among the members of the legal community, leading to further experimentation and more thorough investigation of the possible ramifications of the idea within our system of justice. More definite answers and the resolution of possible doubts can only be provided through the trial and error of actual experience.

The numerous advantages of the videotape trial are perhaps most profitably demonstrated as they relate to particular participants in the trial process. Therefore, we shall now con-

<sup>19</sup> To this author's knowledge, the other videotape trials which have been conducted as of the date of this writing include one in Cuyahoga County, Ohio (Judge Francis Talty presiding) and two in Summit County, Ohio (Judge James Barbuto presiding). The latter two, one civil and one criminal, were conducted simultaneously by the same trial judge. For descriptions of them, see Bandy, *Summit Jury Pioneers Trial by Television*, Akron Beacon Journal, Aug. 2, 1972, at A-12, col. 1; *Akron Juries See Trials on Edited Video Tapes*, N.Y. Times, Aug. 14, 1972, § I, at 55, col. 3. A second videotape trial conducted by this author was *Swain v. Norfolk & W. Ry. Co.*, No. 39,494 (C.P. Erie County, Ohio, Jan. 24, 1973).

<sup>20</sup> For a detailed and comprehensive discussion of the advantages potentially derivable from videotape trials, see Morrill, *Enter — The Videotape Trial*, 3 JOHN MARSH. J. PRAC. & PROC. 339 (1971).

sider what the videotape trial does and can mean for the following six groups of persons: court administrators, the trial courts, the jury, the trial attorneys, witnesses, and the appellate courts.

### 1. The Court System and Its Management

The traditional American jury system has been the object of much critical scrutiny in recent years and appears to be losing support among a discernible segment of the bench and bar.<sup>21</sup> This negative assessment of the jury system in modern times is largely a function of the tremendously overburdened and crowded dockets in large urban areas which lead to delays between complaint and trial inimical to the concept of speedy trial. As society becomes increasingly more "litigation prone," this problem promises to reach even more serious proportions. The videotape procedure could offer significant amelioration of this problem in several ways.

The videotape method could prevent many disputes from ever reaching the trial stage. The taping of all the testimony and evidence prior to submitting it to the jury should result in a greater probability of settlement since the evidence will then hold no unknown elements. After a copy of the trial has been prepared and the court has ruled on all of the objections, the attorneys and parties will be in a position to evaluate the effectiveness of their case realistically and definitively by reviewing what the jury will *actually* see (as opposed to what the attorneys *expect* the jury to see) should the matter proceed to trial. Settlement talks should become more realistic, because certain variables which now prevent pretrial resolution, such as the effectiveness of a key witness' presentation, will be known in advance. Thus, deliberations concerning settlement will be limited to what the jury will actually see and possible uncertainties as to what the evidence will adduce will have no place in such discussions. Presently, for example, attorneys often postpone truly serious settlement negotiations until after a key witness has testified and his testimony can be evaluated or until a ruling on an evidentiary matter crucial to his case is made. With videotape, this can be done well before the jury is impaneled, and more importantly, the necessity of a judge spending several valuable days presiding over what turns out to be a needless judicial exercise should be avoided. Rather than guessing at the strength of each side's case, lawyers will be able to bargain from a knowledgeable position.

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<sup>21</sup> Sources cited note 2 *supra*.

Since matters will not be set for trial until the videotape is completed, the length of trial will be known in advance. Such knowledge will dramatically enhance the scheduling process, leading to firm settings for hearings and trials and a more efficient use of the court's time and facilities. Delays resulting from overly conservative estimations regarding the anticipated length of trial will be averted.

When a dispute reaches the trial stage, many other advantages of the time-saving variety will derive from the videotape procedure. No in-trial time will be expended for bench or chamber conferences, for settlement negotiations, or for rulings on motions. There will be no last minute delays in waiting for late witnesses or for procuring necessary real evidence. Recesses to allow the attorneys to prepare closing arguments or for the court to prepare its instructions will not be necessary. The ever-present specter of mistrial caused by misconduct of witnesses or counsel which now inheres in the trial process will be avoided altogether, since the testimony will be ruled upon and edited prior to its submission to the trier of fact. The cumulative result of all of these benefits will be smoother trials. Distractions will be largely eliminated, fostering continuity, and maximizing the jury's opportunity to reach a result consistent with the evidence.

Although courts will necessarily incur expenses in procuring and maintaining the necessary equipment, and of course, training and paying its operators, there still would be a net economic savings.<sup>22</sup> Since videotape trials can be held in small viewing rooms, as opposed to the larger courtrooms required for traditional jury trials, the costs of physical facilities could be significantly reduced. Additionally, the preparation of the record for appeal will be simplified. The only additional effort at trial would be the recording of the voir dire, opening statements, and closing arguments.

## 2. The Trial Court

Videotape trials, as clearly illustrated by the *McCall* case, will effect a drastic reduction in the amount of time which an individual trial judge must devote to hearing a case in most instances. The judge need not preside over the presentation of all of the testimony but need only hear that testimony related

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<sup>22</sup> The cost of videotaping trials is less expensive than most persons would first imagine. For example, the Ohio Judicial Conference grant to conduct the *McCall* pilot trial was \$1000. The actual total cost for the videotape expense (including machine rental, operator, and tapes) was only \$360.

to objections or motions raised by counsel. Of course, where the court is required to rule upon a motion for a directed verdict or for judgment notwithstanding the verdict, it must view all of the relevant testimony. However, in view of the fact that the taped trial will take much less time to view than it now takes to hear an entire case, a time saving will ensue in this instance as well.

At present, when objections are raised or motions made during the course of the trial, the court is ordinarily compelled to render its ruling at once under pressure to expedite the proceedings. The videotape procedure will render the on-the-spot ruling unnecessary. When such objections and motions are recorded on videotape, the court may view them at its convenience in chambers with increased temporal latitude within which to evaluate the merits of the particular issue. Allowing the court ample time to consider its decisions, with no delay to other participants in the matter, should significantly reduce incorrect rulings and resultant prejudicial error, leading to increased fairness to all concerned and fewer appeals. The same circumstances and reasoning apply to jury instructions.

Since there is nothing that the attorneys and the judge can do while the trial tape is being shown to the jury, there is no reason why they should remain in the courtroom. A supervisory person in the court's control (such as the bailiff) can attend to and observe the jury in order to insure that no conversations occur and that the proceedings are properly conducted. At recesses, this supervisory person can discharge the court's traditional duty of admonishing the jury with respect to their behavior when out of the courtroom. Fewer judges could handle a greater trial load since the court's presence is required only during the opening and closing phases of the trial. Additionally, a single trial judge could actually preside over more than one trial simultaneously.<sup>23</sup> Thus, more than one trial may be set for an individual judge during a particular time slot without causing a conflict. Realization of these savings of the court's time will enable far more cases to be tried to juries.

### 3. The Jury

The videotape technique will simplify the task of the jury in several important respects. A prominent advantage is created by the fact that prospective jurors will be called only for trials

<sup>23</sup> See Summit County cases, *supra* note 19.

in which the need for them to return a verdict is certain. No longer will jurors be summoned to sit patiently through a long trial only to have the case taken from it by a directed verdict. Under the proposed procedure, the jury will be called only after the court has overruled motions for a directed verdict and the necessity of its verdict is a certainty.

Total jury time will be shorter and what is heard during that time restricted to purely evidentiary matters and arguments of counsel. No time will be unproductively expended in waiting for tardy witnesses to appear, for the judge to rule upon motions or objections, or for bench or settlement conferences to conclude. In short, none of the traditional interruptions now experienced at trial which the jury is asked to endure patiently will plague the videotape trial. Such distractions will be eliminated, and the jury will have advance knowledge as to exactly how much time it will take to hear all of the evidence.

In addition to great patience, we presently require jurors to display an omniscient ear and a selective memory. It is with respect to these expectations that the videotape trial will fundamentally improve conventional trial practice. During almost every trial, objections are raised to questions and answers. Ordinarily, certain of these objections will be sustained by the court and the relevant testimony ordered stricken from the record and the jury admonished to put out of mind that which it has experienced. The jurors are expected to hear and retain all of the questions and answers, but when an objection is sustained, they are expected to forget the objectionable material. To ask a juror to erase a segment of his experience upon demand is to require of him an act beyond human capacity. This problem is avoided entirely by the videotape method because only that testimony which has not been objected to by counsel and that testimony objected to but deemed admissible by the court are shown to the jury. The jurors can concentrate fully upon remembering all of the testimony which they will view. There will be no admonitions to the jury, instructing them to disregard and forget certain testimony selectively and upon demand. The absence of delays and avoidance of interruptions during the presentation of evidence will function to enhance continuity of the trial and avert distractions, and thus, maximize the jury's opportunity to digest the evidence and come to a verdict in conformity with that evidence.

The videotape procedure will allow greater and more effective use of the jury view, now an expensive and time-consuming practice. Since views or out-of-court experiments can be recorded and shown to the jury in court, travel to the scene is obviated, and the delay in trial necessitated by a view is minimized. A more complete view of a scene or any matter in controversy can be given to the jury on videotape. Such a view will also be from a single point of view, as determined by counsel, and each juror will see exactly the same picture, thus enhancing uniformity of observation of important demonstrative evidence. Also, a jury view as presently conducted often fails to portray fully how a disputed incident occurred for the reason that conditions during the view differ from those which existed at the time of the event in question. Given videotape, the scene can be recorded when conditions most closely approximate those in being at the time of the event in dispute. The jury's understanding of the events relative to the scene can be further enhanced by the integration of testimony and the use of diagrams, charts, and closeups in the view segment of the videotape. Additionally, since the jurors never go to the scene, the problem of misconduct of a juror during the view is eliminated.

The order of the presentation of evidence by videotape is amenable to a control and structuring not always achievable under present trial practice when an unforeseen circumstance, such as the sudden unavailability of an important witness, arises. All testimony will be in context and ordered clearly and logically to enhance understanding of the issues which the jury must resolve by its verdict.

The above discussion highlights some of the advantages enjoyed by the jury when the videotape trial method is employed. Some minor problems of a mechanical nature remain to be solved.<sup>24</sup> However, the positive attributes of a videotape trial from the point of view of the jury would appear to represent a significant improvement of trial practice in a way which will enhance the evaluative and deliberative processes and, as a result, lead to more logical, consistent, and uniform jury verdicts.

#### 4. The Attorneys

Attorneys will benefit from the videotape trial method in

<sup>24</sup> See Watts, *supra* note 18, at 52-53. For an excellent discussion of the technical capabilities of videotape and its potential value for the legal profession, see Stone, *Use of Videotape in the Legal Profession*, 45 OHIO B. 1213 (1972).

various ways. First, the attorneys can conduct the taping at a mutually convenient time and place. This allows greater flexibility in scheduling their individual daily calendars. This procedure also allows them to examine witnesses in the order best suited to develop the issues inherent in the dispute, not in the manner dictated by the availability of witnesses at trial time. Even if witnesses cannot be examined in the preferred sequence, the order of testimony can be rearranged with the permission of the court in the editing process so as to present the evidence in the most understandable fashion. The attorney and witness both are able to maintain continuity because testimony is not interrupted by the recesses which often occur in live trials. As mentioned previously, effective and full use of the advantages of the jury view can be more routinely utilized under the videotape system in order to impart to the jury a fuller understanding of the events involved in the controversy.

The element of surprise is virtually eliminated by this method of presentation. Pressure associated with the omnipresent possibility of surprise will not be a factor, and the lawyers can attend more closely to what the evidence will show. Knowing the full content of the evidence in advance will also allow more time for the preparation of objections, motions, and briefs for evidentiary questions, directed verdicts, and similar questions which ordinarily arise during the course of a courtroom trial. Opening statements would involve comments by the attorneys concerning only what the evidence *does* show, not, as at present, what the attorney *expects* the evidence to show. With respect to closing arguments, attorneys will have ample time to prepare and perfect this important phase of the case and not be limited to a hurried drafting prepared during a recess. These qualities of the videotape trial will tend to reduce pressure upon attorneys and, thus, minimize the likelihood of a fatal mistake at trial. In addition, the personality of the advocate will assume a diminished importance in the trial context, tending to reward careful and thorough pre-trial preparation, and making reality conform more closely to the ideal that theatrical talent of counsel should be extraneous to the proper resolution of a legal dispute.

The effective use of expert witnesses would be furthered by the videotape technique. Their cost, for example, would likely be reduced because the expert's testimony could be recorded at his convenience in his office or laboratory. Also,

lawyers with specialized knowledge could be employed to examine a particular expert. Trial counsel could then familiarize himself with the esoteric aspects of the case in less time, since the examination of the expert witness could be conducted by a lawyer already equipped with the expertise necessary for thorough and proper examination. Adoption of this specialized use of attorneys would lead to a wider participation in trial practice within the legal community.

#### 5. The Witnesses

Witnesses would also, of course, benefit from the expanded scheduling flexibility offered by the videotape method. The time of their appearance can be arranged to meet the demands of their personal schedules. Also, doctors can testify in a hospital or their offices, where records are available, requiring minimal interruption of their professional duties. Incapacitated and very elderly persons can testify in their homes without having to make the trip to the courthouse. Instead of the dull and dry spectacle of a lawyer reading a written deposition of the testimony of unavailable witnesses into the trial record, the jury has the advantage of viewing such a witness with the opportunity to observe his demeanor and comportment. In short, witnesses can testify under circumstances most favorable to them and under conditions in which their testimony is likely to be best presented.

Testimony can be taken and preserved at a time much closer to the transaction or occurrence at issue. The usual delay from complaint to trial which often hinders a witness's memory, rendering his testimony inconclusive, will be avoided. In personal injury actions, for example, the use of videotape makes it possible to record testimony relating to liability at a time when the memories of the witnesses are fresh, while the medical testimony relating to the nature, extent, and permanency of injuries can be recorded at a much later date when the experts are best equipped to give a proper prognosis. Thus, testimony can be taken at the time when it will be most useful and effective, rather than as dictated by the trial date.

Witnesses could actually testify at the scene of an accident in order to demonstrate more clearly for the jury just how the event occurred. Rather than, as today, relying on a jury view or diagram, supplemented by in-court testimony, the entire procedure can be accomplished more expeditiously and completely by combining both the view and the witness offering explanatory testimony in the same recorded sequence.



The atmosphere during the videotape witness examination is more relaxed as compared to the courtroom witness stand. Therefore, witnesses will testify in a more natural manner, free from nervous tension resulting from the atmosphere of the courtroom which can tend to cause forgetfulness and mistakes necessitating the ordering of a mistrial. The probability of nervousness destroying the worth of a reliable and important witness can be substantially reduced as a result of the more relaxed atmosphere in the videotape procedure.

The witness will literally be the center of the jury's attention as he fills the screen of the videotape monitor. Normal courtroom distractions will be absent (including those which some attorneys intentionally create), allowing the jury to attend solely to the evidence at hand with increased concentration.

#### 6. The Appellate Court

The videotape trial promises to be of inestimable value with respect to sustained appeals leading to new trials. The appellate court would view unedited portions of the master tape which had been the subject of rulings on objections. On remand, the trial tape can merely be re-edited to conform with the directions of the appellate court and viewed by a new jury. Thus, the tremendous expense and time required by a new trial can be substantially avoided. The appellate court need not be concerned with the possibility that a party's case could be destroyed by the loss of an important witness' testimony. In addition, the appellate court would be in a much stronger position to rule upon a matter appealed which is within the discretionary power of the trial court. Abuse of discretion would become more apparent as the appellate court literally steps into the shoes of the trial court in hearing testimony.

### III. IMPLEMENTATION OF VIDEOTAPE TRIALS

As a result of the overwhelmingly favorable response to the *McCall* experiment,<sup>25</sup> the Ohio Supreme Court, on January 15, 1972, submitted to the state General Assembly the following proposed addition to the Ohio Rules of Civil Procedure:

Rule 40 — *Pre-recorded testimony* — All of the testimony and such other evidence as may be appropriate may be presented at a trial by videotape, subject to the provisions of the Rules of Superintendence.<sup>26</sup>

<sup>25</sup> The Director of the Ohio Legal Center Institute observed the *McCall* trial and labelled the experiment an "unqualified success" with "a far greater potential than anyone had envisioned." McCrystal, *supra* note 18, at 2. See also articles cited note 18 *supra*.

<sup>26</sup> OHIO R. CIV. P. 40 (Supp. 1972).

Meeting with the legislature's approval, the rule was adopted and became effective on July 1, 1972. Thus, the State of Ohio became the first American jurisdiction in which the employment of videotape to present *all* of the trial testimony and evidence has been explicitly approved. On September 1, 1972, Superintendence Rule 15, "Testimony and Other Evidence Recorded on Videotape,"<sup>27</sup> was promulgated by the Ohio Supreme Court. This rule dictates the implementation of Ohio Rule of Civil Procedure 40 and regulates by detailed direction the manner in which testimony is to be taken, presented, and preserved in a videotape trial. Effective January 5, 1973, Superintendence Rule 15 was amended, and the supreme court issued two additional rules related to the use of videotape in courtroom proceedings: Superintendence Rule 10, "Verbatim Transcripts; Recording Devices," providing for the use of videotape as the official trial record, and Superintendence Rule 11, "Improper Publicizing of Court Proceedings," prohibiting, on pain of contempt, unauthorized uses of mechanical recording devices in and around courts during sessions. This article will conclude with a brief consideration of Superintendence Rule 15. Salient points from the following subsections of the rule will be highlighted: (1) scope of the rule, (2) depositions, (3) presentation of evidence solely by videotape, (4) transcripts, (5) equipment, (6) assessment of costs, and (7) disposition of videotapes filed with the court. (See Appendix for full texts of the rules.)

Subsection (A) defines the scope of the rule and clearly demonstrates Ohio's commitment to videotape trials by directing application of the rule to all courts of record in the state and to all appellate courts in the review of cases which contain videotape evidence in the record of appeal.<sup>28</sup>

As will be seen later, other subsections of the Superintendence Rule require the courts to provide storage facilities, certain minimum equipment, and competent operators. All Ohio trial courts of record must, under the rule, be prepared to hold videotape trials. This preparation may involve a substantial reallocation of the court's resources of space, personnel, and money.

Superintendence Rule 15(B) prescribes the manner in which videotape depositions are to be taken, filed with the court, and prepared for presentation at trial.<sup>29</sup> The subsection begins with the authorization of the recording of depositions by video-

<sup>27</sup> OHIO SUPT. R. 15 (see App.).

<sup>28</sup> *Id.* at 15(A).

<sup>29</sup> *Id.* at 15(B).

tape, outlining the type of notice that must be given, officers capable of taking the deposition, and the method of certification. In general, these requirements are the same as those for the recording of a deposition by traditional methods, i.e., stenographically.<sup>30</sup>

At this point the similarity with previous procedure disappears.<sup>31</sup> If no objections are made by any of the parties during the deposition, the officer, upon request of any party, shall file the tape along with the certification with the court. However, if objections were made and a party so requests, the officer will file the tape with the *trial judge* for the purpose of obtaining rulings upon the objections. The rule, however, provides that an audio sound track of the deposition is sufficient for this purpose.

The trial judge will then rule on the objections. He may view the entire videotape or only those parts to which objections have been raised. The trial judge's rulings and instructions for editing will be returned with the videotape to the officer and notice of the same given to the parties. The officer will then edit the videotape according to the judge's instructions, eliminating all references to objections. This being completed, the officer will then file with the *court* both the original and the edited tapes.

Except upon an order of the trial judge, the videotape filed with the court will not be available for inspection or viewing prior to trial. However, the clerk of the court may release the tapes to the officer of the deposition in order to make a copy for a party.

Any objections not previously raised nor waived may be made at trial, but only before the testimony in question has been presented to the jury. If the objection is sustained, the tape will be edited to conform to the judge's ruling.

Subsection (C) is applicable when Rule of Civil Procedure 40 is invoked and the entirety of the testimony and evidence is presented by videotape.<sup>32</sup> Such a trial, consisting of only videotape evidence may be held under agreement of all of the parties and with the consent of the trial judge, or the court may in its discretion order the trial conducted by videotape.<sup>33</sup> The best evidence rule and the limitations normally placed upon the use of

<sup>30</sup> *Id.* at 15(B) (1-5).

<sup>31</sup> *Id.* at 15(B) (6-9).

<sup>32</sup> *Id.* at 15(C).

<sup>33</sup> *Id.* at 15(C) (2).

depositions are inapplicable in such a trial.<sup>34</sup> Additionally, no objections will be entertained during the presentation of the testimony.<sup>35</sup>

Subsection (C) also provides that neither the attorneys nor the trial judge must be present in the courtroom while the jury is viewing the testimony.<sup>36</sup> However, the trial judge is not to leave the courtroom without instructing the jury as to their duties and responsibilities or without leaving the jury in the charge of an official of the court. The judge, however, still has the same duties and responsibilities as he would were he in the courtroom.

Subsection (D) confers discretionary power upon the trial judge to designate the means to be utilized in the preparation of the official transcript.<sup>37</sup> Any recording techniques permitted by Superintendence Rule 10 may be employed to preserve the proceedings. If the record is made by videotape, a party who desires to inspect the transcript may do so by requesting a copy (at his cost), or in lieu thereof, he may view the official tape. To expedite this viewing process, the party must designate (by reference to the event, tape reel number, and time counter reading) the portions of the tape which he wishes to view.

Subsection (E) of Superintendence Rule 15 specifies the equipment to be used and the facilities the court must provide for videotape trials.<sup>38</sup> In order to reduce inconsistency, the Japanese standard one-half inch videotape and its recording and playback machines are designated for use. Any party recording testimony on an incompatible tape must pay for the conversion to the standard tape. The court must provide playback and reproducing facilities. It may, however, purchase, lease, or contract for the availability of the equipment when needed at its own option. It may also train its own personnel or contract for the services of a competent operator. The court, as a minimum, must have a videotape player and monitor, having a 14-inch screen. They need not be color. The court is also responsible for proper maintenance of the equipment, including the periodic playing of a test tape.

Subsection (F) sets out by whom the various costs of a

<sup>34</sup> *Id.* at 15(C) (1). This provision applies only to trials where *all* of the testimony is by videotape.

<sup>35</sup> This rule is in contrast to that for videotape depositions only. *Id.* at 15(C) (4). Compare with *Id.* at 15(B) (9).

<sup>36</sup> *Id.* at 15(C) (5).

<sup>37</sup> *Id.* at 15(D).

<sup>38</sup> *Id.* at 15(E).

videotape trial are to be borne.<sup>39</sup> As a general rule, it can be said that the cost of the videotape upon which testimony is recorded shall be borne by the proponent of the testimony, if the original, or the requesting party, if a copy. All other costs, except that of playing the tape to the jury, which is an expense of the court, will be treated as costs in the action.

Subsection (G) provides for disposition of videotapes filed with the court.<sup>40</sup> Ownership remains with the proponent of the testimony. Thus, tapes may be reused, providing they are of acceptable quality. In general, the trial court may authorize the release of the tape upon final disposition of the cause, whether before trial, after trial when no appeal is filed, or after final appeal.

### CONCLUSION

The successful *McCall* experiment and the resultant change in the Ohio Rules of Civil Procedure signal a radical change in the trial practice of the future. In the belief of some, the videotape trial offers advantages over conventional trial procedure, which not only aid in the relief of overburdened urban dockets, but which also significantly improve upon the administration of justice. The jury's task is simplified and made realistic by requiring the jury only to concentrate upon and remember all of the evidence presented to it. The psychological impossibility of selectively forgetting upon demand no longer plays a part in videotaped jury trials. Not only will time be saved at almost every step up to and through trial, but also courtroom histrionics for which the legal profession is not infrequently admonished will be totally eliminated. Testimony can be gathered and preserved when it promises the maximum value. The court has increased opportunity to weigh the merits of objections and motions in making its rulings. Attorneys will not suffer from extraneous pressures emanating from the imperative to make extemporaneous decisions of trial strategy and tactics while in the heat of a courtroom contest. Witnesses' testimony will be elicited in an atmosphere more conducive to the telling of truth in a natural, more relaxed manner. Appellate courts can supervise the discretionary power of the lower courts more effectively. These are but a few of the reasons why the videotape trial promises improvements to traditional fact-finding methods. In view of the many profits to be realized by this new trial concept, one legal commentator

<sup>39</sup> *Id.* at 15(F).

<sup>40</sup> *Id.* at 15(G).

has flatly predicted the inevitability of the widespread use of the videotape trial in the future.<sup>41</sup>

At present, the concept remains in its infancy. However, the adoption of the rule changes in Ohio may well mark the end of the beginning and introduce a new era in trial practice. Certainly, limited substitutional uses of videotaping in the conventional trial format are on the rise. Whether the pre-emptory use of videotaping—using recorded testimony in lieu of live witnesses for the entire trial—will eventually become the rule throughout the country cannot as yet be determined. However, in view of the advantages it offers and the fact that it is but a small logical step from the use of videotape for depositions, demonstrative evidence, jury views, and so forth (as is now rapidly becoming the case), to the use of videotape for the entire trial, the merits and full implications of the idea must be explored now. Certainly, it is an alternative to the present system which has proved itself workable, and, therefore, has earned the commitment of our full attention and critical scrutiny. Even at this early stage in its development the videotape trial has worked well. With the imaginative aid of the legal community, it could work far better in the future.

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<sup>41</sup>Morrill, *supra* note 20, at 239.

## APPENDIX

## SUPERINTENDENCE RULE 10

## VERBATIM TRANSCRIPTS; RECORDING DEVICES

Proceedings before any court, proceedings before a grand jury, and discovery proceedings may be recorded by stenographic means, by phonographic means, by photographic means, by the use of audio electronic recording devices, or by the use of video recording systems.

Proceedings in any court which are recorded on videotape need not be transcribed into written form for the purposes of appeal. The videotape recording constitutes the transcript of proceedings as defined in App. R. 9(A) and Sup. R. 15(H)3. A transcript of proceedings transcribed on videotape shall be transmitted in its entirety as a part of the record.

Transcripts of proceedings transcribed on videotape will be filed with the clerk of the trial court at the conclusion of the trial. Transcripts of proceedings transcribed on videotape and other original records of transcript of proceedings shall be maintained in the trial court in the manner directed by the trial court until the case is finally terminated.

(Effective January 5, 1973)

## SUPERINTENDENCE RULE 11

## IMPROPER PUBLICIZING OF COURT PROCEEDINGS

Broadcasting, televising, recording, or taking photographs in the court room and area immediately adjacent thereto during sessions is prohibited, except that a trial judge may authorize:

- (a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration, or
- (b) The use of electronic or photographic means for such other purpose as may be authorized by the procedural or superintendence rules of the Supreme Court of Ohio.

Any violation of this rule shall be considered a contempt of the trial court and punishable as such.

(Effective January 5, 1973)

## SUPERINTENDENCE RULE 15

## TESTIMONY AND OTHER EVIDENCE RECORDED ON VIDEOTAPE

(A) This rule shall apply to all trial courts of record in this state in the reception and utilization of testimony and other evidence recorded on videotape and to all appellate courts in this state in the review of cases in which the Record on Appeal contains testimony or other evidence transcribed on videotape for use at the trial or where the transcript of proceedings, if any, is transcribed on videotape.

(B) *Depositions.*

1. *Authority.* Civ. R. 30 (B) (3) permits a party taking a deposition to have the testimony recorded by other than stenographic means which would include a recording of the testimony on videotape (hereafter referred to as a videotape deposition).

2. *Notice.* The taking of a videotape deposition is subject to the requirements of Civ. R. 30 (B) (3) regarding notice specifying the manner of recording, preserving and filing of the videotape deposition, but it shall be sufficient in this regard if the notice specifies that the videotape deposition is to be taken pursuant to the provisions of Sup. R. 15 regarding the recording, preserving and filing of the videotape deposition.

3. *Officer.* The officer before whom a videotape deposition is taken

shall be one of those officers enumerated in Civ. R. 28. Upon the request of any of the parties, the officer shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape, an audio recording, or a written transcript.

4. *Submission to witness.* When the videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

5. *Certification.* The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by him and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived his right to a showing and examination of the videotape deposition, the witness shall also sign the certification.

6. *Filing.*

(a) *In absence of objections.* If no objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be filed by the officer with the clerk of the trial court upon the request of any of the parties in accordance with Civ. R. 30 (F) (1) and notice of its filing shall be given as provided in Civ. R. 30 (F) (3).

(b) *If objections have been made.* If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted by the officer to the trial judge upon the request of any of the parties within ten days after its recording or within such other period of time as the parties may stipulate, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose. For the purpose of ruling on the objections, the trial judge may view the entire videotape recording, view only those parts of the videotape recording pertinent to the objections made, or he may listen to an audiotape recording submitted in lieu of the videotape recording. The trial judge shall rule on the objections prior to the date set for the trial of the action and shall return the recording to the officer with notice to the parties of his rulings and of his instructions as to editing. The editing shall reflect the rulings of the trial judge and shall remove all references to the objections. The officer shall then cause the videotape to be edited in accordance with the Court's instructions and shall cause both the original videotape recording and the edited version of that recording, each clearly identified, to be filed with the clerk of the trial court.

7. *Storage.* Each trial court shall provide secure and adequate facilities for the storage of videotape recordings.

8. *Inspection or viewing.* Except upon order of the trial judge and upon such terms as he may provide, the videotape recordings on file with the clerk of the trial court shall not be available for inspection or viewing after their filing and prior to their use at the trial of the cause or their disposition in accordance with this rule. The clerk may release the videotape to the officer taking the deposition, without the order of the trial judge, for the purpose of preparing a copy at the request of a party as provided [sic] at paragraph 3.

9. *Objections at Trial.* The effectiveness of a videotape deposition is greatly increased when all of the objections have been ruled upon, following the procedures set forth in this rule, prior to the time of trial. If, however, an objection is made at the time of trial which objection has not previously been waived pursuant to Civ. R. 32 (D) (3) or previously raised and ruled upon, such objection shall be made before the videotape deposi-



tion is presented and shall be ruled upon by the trial judge in advance of that presentation. If such objection is sustained, that portion of the videotape deposition containing the objectionable testimony shall not be presented to the jury.

(C) *Entire Trial Testimony and Evidence.*

1. *Authority.* Civ. R. 40 permits all of the testimony and such other evidence as may be appropriate to be presented at the trial of a civil action by videotape. Civ. R. 40 is limited to cases where the *entirety* of the testimony and appropriate evidence is presented on videotape. Civ. R. 40 does not contemplate treating the entirety of the testimony as a collection of individual depositions. When Civ. R. 40 is invoked and all of the testimony is recorded on videotape, the videotape recordings shall be the exclusive medium of presenting testimony without regard to the availability of the individual witnesses to testify in person. The limitations placed upon the use of depositions do not apply when the entirety of the testimony is recorded on videotape pursuant to the authority of Civ. R. 40.

2. *Invoking Civ. R. 40.* The entire testimony and appropriate evidence may be presented by videotape recording under agreement between or among all of the parties and with the consent of the trial judge. In an appropriate case, having due regard for the costs involved, the nature of the action, the nature and extent of the testimony, and after consultation with the attorneys representing the parties to the action, the trial judge may order the recording of all of the testimony on videotape.

3. *Procedure.* Unless clearly inapplicable, the provisions relating to the taking of a videotape deposition shall apply to the recording of the entirety of the testimony on videotape. The order of the taking of the testimony of the individual witnesses and the order of the presentation of that testimony shall be at the option of the proponent. In ordering, or consenting to, the recording of all of the testimony on videotape, the trial judge shall fix a date in advance of the day assigned for trial by which time all of the recorded testimony must be filed with the clerk of the trial court.

4. *Objections.* All objections must be made and ruled upon in advance of the trial of the cause and no objections to any of the testimony may be entertained during the presentation of the testimony. Edited copies of all the videotape recordings shall be made as may be required to eliminate all references to objections and to reflect the rulings of the trial judge on the objections made.

5. *Presence of counsel and trial judge.* The counsel for the parties and the trial judge shall not be required to be present in the courtroom when the recorded testimony is played to the jury. The trial judge shall not leave the courtroom during the playing of the recorded testimony without admonishing the jurors as to their duties and responsibilities and without leaving the jurors in the charge of a responsible official of the court. The trial judge shall remain within easy recall and shall bear the same duties and responsibilities as if he were physically present in the courtroom.

(D) *Use of Electronic Devices for the Transcribing of Verbatim Transcripts of Proceedings.*

1. *Authority.* Superintendence Rule 10 permits the use of electronic devices as a means of transcribing any court or grand jury proceedings.

2. *Determination of transcribing medium.* The trial judge, in the case of trial proceedings, or the administrative judge, in the case of grand jury proceedings, in exercising his authority over the operation of his court, may order the utilization of any means authorized by Superintendence Rule 10 for preserving the proceedings.

3. In lieu of requesting a copy of the transcript of proceedings, or portion of it, a party may view the transcript of proceedings on file with the clerk of the trial court or the clerk of the court of appeals as may be applicable.

4. Reference to a particular portion of a transcript of proceedings on videotape shall include reference to the event, the number of the reel of tape on which it is recorded, and the elapsed time counter reading.

(E) *Equipment.*

1. *Standard.* To minimize the incompatibility of equipment, the IEAJ Standard, the Japanese Standard one-half inch videotape specifications together with specifications for recording and play back equipment, is specified as the standard for use in the recording of testimony and other evidence on videotape for introduction in the trial courts of this state. If a party records testimony on videotape which is not compatible with the established standard, the party shall be responsible for the furnishing of reproduction equipment or for conversion to the established standard, all of which shall be at the cost of the party and not chargeable as costs in the action.

2. *Provision.* Each trial court shall make provision for the availability of play back or reproducing facilities. As may be appropriate, the trial court may purchase the equipment, may lease the equipment, or may contract for the furnishing of equipment on the occasions of need for the equipment. In the exercise of each of the specified [sic] options, the trial court shall provide for the adequate training of an operator from within the personnel of the court, or for the services of a competent operator from some other source.

3. *Minimum equipment.* As a minimum, facilities shall consist of a videotape player and one monitor, having at least a 14 inch screen. Color facilities shall not be required. Where the trial judge relies upon the two track audio cassette system for ruling upon objections made in the recording of testimony on videotape, the trial court may purchase, or otherwise acquire the modified equipment used in playing the soundtrack recording of the testimony and recording the rulings of the trial judge.

4. *Maintenance.* Proper maintenance of equipment is essential. The trial court shall take all reasonable steps to assure that the equipment is maintained within the operating tolerances. The trial court shall provide for competent regular maintenance of equipment which is owned or leased by the court, including the running of a standard test tape at least once every three months.

(F) *Costs.*

1. *Depositions.*

(a) The cost of videotape, as a material, shall be borne by the proponent.

(b) The reasonable cost of recording the testimony on the videotape shall be treated as costs in the action.

(c) The cost of playing the videotape recording to the jury in the course of the trial shall be treated as a general cost of the operation of the trial court.

(d) The cost of an audio reproduction of the videotape recording soundtrack used by the trial court in ruling on objections shall be treated as costs in the action.

(e) The cost of playing the videotape recording for the purpose of ruling upon objections shall be treated as costs in the action.

(f) The cost of producing the edited version of the videotape recording shall be treated as costs in the cause, provided that the cost of the

videotape, as a material, shall be borne by the proponent of the testimony.

(g) The cost of a copy of the videotape recording and the cost of an audio tape recording of the videotape soundtrack shall be at the expense of the party requesting the copy.

2. *Civ. R. 40 testimony.*

(a) The cost of the videotape, as a material shall be borne by the proponent of the testimony.

(b) The cost of copies for the benefit of the parties shall be borne by the requesting party.

(c) All other cost shall be costs of the action allocated between or among the parties as required by law as may be discretionary with the court.

3. *Electronically prepared Transcripts of Proceedings.*

(a) The cost of copies of the transcript of proceedings or such parts thereof as may be deemed necessary by a party for his use shall be borne by the requesting party or as provided by law.

(b) The cost of viewing a transcript of proceedings transcribed on videotape, as provided for in Sup. R. 15(D)3, shall be borne by the party requesting it or as provided by law.

(c) All other costs shall be costs of the action and payment shall be allocated by the court.

(G) *Disposition of Videotapes Filed with the Court.*

1. *Ownership.* The ownership of the videotape used in recording testimony shall remain with the proponent of the testimony. Videotape may be reused for the recording of testimony, but the proponent shall be responsible for the submission of a recording of acceptable quality.

2. *Release of videotape recordings.*

(a) The trial court may authorize the clerk of the court to release the original videotape recording and the edited videotape recording to the owner of the videotape:

(i) upon the final disposition of the cause when no trial is had.

(ii) upon the expiration of the appeal period following the trial of the cause, provided no appeal is taken.

(iii) upon the final determination of the cause, if an appeal is taken. Provided, however, that if the testimony is recorded stenographically by the court reporter during the playing of the videotape recording to the jury, or to the court sitting without a jury, the videotape recordings may be returned to the proponent upon disposition of the cause following the trial.

(b) The trial court's order of release shall be by journal entry.

(H) *Definitions.* For the purposes of these Superintendence Rules the following definitions apply:

1. *Record.* The record consists of all papers and exhibits thereto filed in any court, the transcript of proceedings, or excerpts thereof, if any, including exhibits, and certified copies of the docket and journal entries prepared by the clerks of the various courts.

2. *Original Record.* The originals of all items which are a part of the Record.

3. *Transcript of Proceedings.* The end product of whatever medium used to preserve the content of proceedings in a trial court.

4. *Transcribe.* The process of preserving the content of oral proceedings or the process of transferring the content of oral proceedings from one authorized medium to the same or any other authorized medium of preservation.

5. *Transcription.* A copy, either in the same medium as the original or in any other authorized medium of reproduction, of an original transcript of proceedings.

(Effective September 1, 1972, as amended, January 5, 1973).